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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 152

FRANK CANIZIO, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT, KINGS COUNTY, STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 22, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1945.

[fol. 1]

IN COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

Present: Hon. Nathan R. Sobel, County Judge.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

FRANK CANIZIO, Defendant

ORDER DENYING MOTION TO SET ASIDE JUDGMENT—April 13, 1945

The above named defendant having moved this court for an order vacating and setting aside a judgment of conviction dated June 19, 1931, and the said motion having been duly submitted,

Now, on reading and filing the notice of motion dated December 27, 1944, and the affidavit of Frank Canizio verified December 27, 1944, in support of said motion, and the affidavit of William I. Siegel, verified March 23, 1945, in opposition thereto, and upon all other papers and proceed-
[fol. 2] ings heretofore had herein, and due deliberation having been had, and the court having rendered its decision on the 5th day of April, 1945, it is, on motion of William O'Dwyer, District Attorney of Kings County,

Ordered, that the said motion be and the same hereby is in all respects denied.

Enter. (Signed) Nathan R. Sobel, County Judge.

Granted April 13th, 1945. Francis J. Sinnott, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 3] IN COUNTY COURT OF KINGS COUNTY

[Title omitted]

AFFIDAVIT OF DISTRICT ATTORNEY—Filed April 4, 1945

STATE OF NEW YORK,
County of Kings, ss:

William I. Siegel, being duly sworn, deposes and says:

I am an assistant district attorney on the staff of the district attorney of Kings County, and make this affidavit, on information and belief, in opposition to a motion made by the defendant for an order vacating and setting aside a judgment of conviction entered against the defendant on his own plea of guilty. The sources of my information and the grounds of my belief are the records and files of the offices of the district attorney and the clerk of the County Court of Kings County.

On May 25, 1931, the defendant together with Patsy Guariglia and Tony Bruno, was indicted for Robbery in the first degree; Grand Larceny in the second degree, and Assault in the second degree, it being alleged that they together took by force and fear a taxicab from one Joseph Grosshandler, Bruno being at the time armed with a revolver.

[fol. 4] The defendants were arraigned on the same day before County Judge Algeron I. Nova, and pleaded not guilty. On June 1, 1931, the defendants personally appeared before Judge Nova and withdrew their pleas of not guilty and pleaded guilty to Robbery in the first degree, unarmed. On June 19, 1931, the defendant was sentenced to a term of fifteen to thirty years.

The defendant in his motion papers now states that at the time of the arraignment and plea he was nineteen years old and unfamiliar with legal proceedings. He further states that when arraigned and when he pleaded guilty he was without counsel and was not advised by the court of his right to counsel, and was not asked by the court whether he desired that counsel should be assigned. He makes the same allegations with respect to the day of sentence.

I have inspected the records of the County Court and find the following to be the facts:

The clerk's minutes (vol. 323 at p. 89) do not show the name of any counsel appearing for the defendant at the time

he was arraigned and pleaded not guilty. Judge Nova's daily calendar for that day is not available. The reverse side of the indictment on which the notation of the plea of not guilty is entered has a printed line reading as follows: "Counsel assigned yes no". The words "yes" and "no" are both stricken out.

[fol. 5] No notice of appearance was filed on behalf of the defendant until June 17, 1931, when an attorney named John J. Olivia of 53-63 Park Row, New York City, filed a notice of appearance.

The records shows that on June 1, 1931, when the defendant withdrew his plea of not guilty and pleaded as heretofore stated, that assistant district attorney Sullivan appeared. The records make no mention of any counsel appearing for the defendant. The typewritten transcript of the minutes of the proceedings on June 19, 1931, when the defendant was sentenced, shows that counsel for all of the defendants appeared.

I have spoken to Mr. Rudolph Gross who appears to have been the clerk in the part on June 1, 1931, when the plea of guilty was taken, and Mr. Gross states that to the best of his recollection it was not his procedure when a case appeared on the trial calendar for trial, but where the defendant withdrew a previous plea of not guilty and wished to plead guilty, to advise the defendant of his right to counsel. However, this does not foreclose the possibility that the trial court itself thus advised the defendant or that he had been so advised at the time of arraignment.

In sum, from the records it cannot be stated affirmatively that the defendant was advised of his right to counsel at the time of the arraignment and plea, but it also cannot be stated affirmatively that he was not thus advised. It is sub-
[fol. 6] mitted, however, that a presumption exists that both the court and the clerk performed their official duties and that the Court directly or through the clerk informed and advised the defendant of his right to counsel.

This defendant has delayed for a period of fourteen years in making the application attacking the jurisdiction of the court. It is possible that during that time records which formerly existed have disappeared, and it is certainly true that witnesses who might have disproven the defendant's present assertions have over the years lost any independent recollection of the actual occurrences. In the absence of convincing affirmative proof (the burden to submit which

is on the defendant) of the failure of the court to perform his official duty properly, the presumption of regularity should prevail.

Wherefore, your deponent respectfully prays that the motion be denied.

William I. Siegel.

Sworn to before me this 23rd day of March, 1945.
Frank Di Lalla, Notary Public, Kings Co.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 7] IN COUNTY COURT OF KINGS COUNTY

[Title omitted]

AFFIDAVIT OF SERVICE—Filed February 8, 1945

COUNTY OF CAYUGA,
State of New York, ss:

To: The County Court, Kings County:

On this 27 day of December, 1944, I have placed in the United States mail box at the post office in Auburn State Prison a copy of all the papers here appended. Such being properly sealed and addressed to the District Attorney, District Attorney's Office, Brooklyn, N. Y.

(Signed) Frank Canizio, 135 State Street, Auburn, New York.

Sworn to before me this 27 day of December, 1944.
(Signed) Henry F. Schmitz, Notary Public, Cayuga County.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 8] In County Court of Kings County

[Title omitted]

Notice of Motion—Filed February 8, 1945

Sirs:

Please Take Notice, that upon the annexed verified petition of Frank Canizio, duly verified this 27 day of December, 1944, the pleadings, papers and all the proceedings heretofore and herein, the undersigned will move this Court at a stated term thereof, to be held at the County Courthouse in Brooklyn, on the 15 day of January, 1945, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order vacating and expunging from the records a void judgment that was rendered on or about June 19, 1931, and for such other relief as the Court may deem just and proper on the premise.

Yours, etc., Frank Canizio, 135 State Street, Auburn, New York.

To: Thos. C. Hughes, Esq., Asst. District Attorney, Kings County, Brooklyn, N. Y.

To: Mr. John Lantry, Clerk, Kings County Court, Brooklyn, N. Y.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 9] In County Court of Kings County

[Title omitted]

Petition to Vacate and Expunge from the Record a Void Judgment. The County Court of Kings County Having Denied Petitioner His Constitutional Right to the Assistance of Counsel Was Without Jurisdiction to Render Such Judgment—Filed February 8, 1945

County of Cayuga,
State of New York, ss:

To: Honorable Nathan A. Sobel, County Judge:

The petitioner, Frank Canizio, having been duly sworn according to law, deposes and says:

That he is the petitioner in the above entitled action, that he is a poor person with no funds to employ learned coun-

sel, so he therefore appears in person in this proceeding. He prays, nevertheless, that this Honorable Court protect his constitutional and statutory rights, whenever and wherever necessary in this proceeding.

He respectfully petitions this Court to vacate and expunge from the records a judgment rendered against him on or about the 19th day of June, 1931, sentencing him for an indeterminate term in State Prison, the minimum of which was fifteen (15) years and the maximum of which was thirty (30) years, for the reason that the County Court of Kings County did not have jurisdiction in rendering such [fol. 10] judgment having denied your petitioner his constitutional right to the assistance of counsel, and failed to comply with the mandate of the Code of Criminal Procedure, whereby the Court, at all stages of criminal proceedings, when a defendant appears for arraignment without counsel, must inform him of his rights to the assistance of counsel, ask him if he desires counsel, and if so, the Court must assign counsel. Or should the defendant waive any constitutional rights such "waiver" should be appropriately noted on the record and made an integral part of the proceedings.

THE FACTS

On May 25, 1931, the petitioner, with two others, was indicted by the Grand Jury of Kings County for the crime of Robbery in the first degree, inasmuch as it was alleged he stole and took from the possession of Joseph Grosshandler, a taxicab of the value of five hundred dollars. The petitioner being at the time only 19 years of age and never before convicted of a crime. He resided at the time at 1178 72nd Street, Brooklyn, New York. His parents were both dead. He had no substantial education. In fact he had no education at all.

On this same date, May 25, 1931, he was arraigned in the Kings County Court to plead to the indictment (No. 3465b). He was without counsel. He did, however, enter a plea of not guilty to the indictment. He was ignorant of his constitutional rights to counsel, and being a poor boy without parents or money, he believed he could not be represented [fol. 11] by counsel, having no money to pay counsel. The Court on this occasion did not inform him of anything to the contrary. It did not, when he appeared without counsel, ask him if he desired counsel or informed him if he so de-

sired that the Court would assign counsel. It cannot be said that he waived his right to counsel as such a waiver would be the intentional relinquishment or abandonment of a known right, but since this 19-year-old boy did not know, and was not advised of his rights to counsel, a waiver would be impossible. (Bennecke v. Conn. Mut. Life Ins. Co. 105 U. S. 455; Johnson v. Zerbst, 304 U. S. 458; People v. Bradner 107 N .Y. 1; People v. Miles, 289 N. Y. 360).

On June 1, 1931, the defendant again appeared personally and without counsel and withdrew his plea of not guilty theretofore entered and plead guilty to the crime of robbery in the first degree. The Court again failed to inform him of his right to counsel and he did not waive his right as he was ignorant of such constitutional prerogative. The proceedings were had before Nova, J., in Part 3 of the Kings County Court. The petitioner was immediately remanded for sentence.

On June 19, 1931, the petitioner was again arraigned in the Kings County Court, this time for sentence. He again appeared without counsel, he was not informed in any manner of such constitutional right to counsel and neither did he waive such right as he was totally ignorant of its existence, and the Court failed in its duty, mandatorily prescribed by the statute, to inform him of his right to the assistance of [fol. 12] counsel, but instead inflicted the maximum punishment prescribed for the crime of robbery in the first degree, namely, fifteen to thirty years in State Prison. All the records of the Kings County Court having bearing on the case of petitioner in this instance concur in the foregoing representations.

JURISDICTION

It is well settled that this Court has the authority to vacate and expunge a judgment, where the Court had no authority to render it in the first instance proceeding the denial of the petitioner his constitutional right to the assistance of counsel for his defense, where in such denial the Court lost jurisdiction, and that such power to so vacate and expunge void orders and judgments inheres in the very constitution of the Court. See Robinson v. Johnson, 118 F. (2) 998; Matter of Morhaus, 293 N. Y. 131; Picketts Heirs v. Legerwood 7 Pet. 144; Ex Parte Hawk. 64 S. Ct. 448; Ex Parte Abernathy 64 S. Ct. 13; For Illinois cases by Mandamus see People ex rel.

Carlstrom, Atty. Gen. V. Shurtleff, Judge 189 N. E. 291; People ex rel. Swanson v. Kelly 352 Ill. 567, 186 N. E. 188. Point First in petitioner's brief is dedicated to this proposition lest this Court might have some doubt as to its inherent authority to grant the relief herein prayed for.

Questions Presented

(1). Whether the provisions of the New York State Constitution*al*, Article 1, Section 6, guaranteeing the assistance of counsel in all criminal trials at all stages of the proceed-
[fol. 13] ings have been complied with.

(2). Whether the Kings County Court, Nova, J., complied with the statutory mandate of Section 308 of the Code of Criminal Procedure, whereby that when a defendant appears on arraignment without counsel, the Court *must* ask such defendant if he desires counsel, and if he does, the Court *must* assign counsel.

(3). Whether the petitioner, in view of the negative reply that must be given to questions 1 and 2 was deprived of his liberty without due process of law in violation of the 14th Amendment of the United States Constitution.

Reasons Relied on for Granting This Petition

The petitioner was denied, on each and every arraignment in the Kings County Court on May 25, 1931, June 1, 1931, and June 19, 1931, the right to the assistance of counsel as provided by the Constitution of this State, and the County Court of Kings County, in failing to obey and comply with the Constitutional and statutory mandates expressly enacted to protect this constitutional right, was without jurisdiction to render the judgment against the petitioner or to accept his plea of guilty to robbery in the first degree, and all the proceedings had subsequent to the denial of this constitutional right were void, and the petitioner was deprived of his liberty without due process of law (Code of Criminal
[fol. 14] Procedure, Section 308; New York State Constitution, Article 1, Section 6; United States Constitutional Amendment 14).

Wherefore, your petitioner prays that this Court cause to be issued, an order vacating and expunging from the records the void judgment rendered against your petitioner whereby he was sentenced to fifteen to thirty years in State

Prison on or about June 19, 1931, and that your petitioner have such other and further relief as the Court may deem just and proper on the premise.

Dated at Auburn, New York, December 27, 1944.

(Signed) Frank Canizio, Petitioner in Person, 135 State Street, Auburn, New York.

Duly sworn to by Frank Canizio. Jurat omitted in printing.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 15] In County Court of the County of Kings

Part III

Before Hon. Algernon I. Nova, County Judge

The People of the State of New York, Plaintiffs,

against

Frank Canizio, Patsy Guariglia, and Tony Bruno, Defendants

Stenographic Minutes of Arraignment

Brooklyn, N. Y., June 1, 1931.

Appearances:

Harry Sullivan, Esq., Assistant District Attorney, for the People.

The Court: This is indictment No. 3465-b, against Frank Canizio, Patsy Guariglia, and Tony Bruno. They are indicted for robbery in the first degree, grand larceny in the second degree, and assault in the second degree in that on May 22nd, 1931, they robbed one Joseph Grosshandler of a taxicab valued at $500., armed with a gun. Canizio, how old are you?

Canizio: Nineteen, Your Honor.

The Court: Guariglia, how old are you?

Guariglia: Sixteen.

The Court: Bruno, how old are you?

Bruno: Seventeen.

The Court: Bruno is now out on a suspended sentence of petit larceny from this court; Canizio in 1928 served a [fol. 16] House of Refuge juvenile delinquency sentence. Guariglia, have you ever been in any reformatory?

Guariglia: No, sir.

The Court: No record?

Guariglia: No, sir.

The Court: The story connected with these three defendants is as follows: that on the day in question they hailed a taxicab in New York, the taxicab driven by Joseph Grosshandler, and in the night time thereof they travelled to Brooklyn. When they got over into Brooklyn, then at the point of a gun they ordered this taxicab driver from his seat and they took the taxicab away from him. However, before that was done, these defendants admitted that they directed the taxicab driver to stop twice at least, whereat, upon each occasion thereof these three defendants, or the two of them and two others not here, went out and held up two other men; and the result of the robberies was about the sum of fifty cents, as I am told. That was the taxicab. The next night they went out and they stole a Buick automobile, and that charge is contained in indictment no. 3465-d; but, however, in view of the plea they are taking to the robbery indictment by and with the consent of the district attorney, we are going to dismiss as against these three defendants the larceny charge of the automobile. Oh, the other two defendants——

Mr. Sullivan: I don't think Bruno was on the larceny. [fol. 17] The Court: If Bruno is not on the larceny, that does not apply. It seems, however, that when they stole this Buick automobile it was then, or about that time that Detective Francis Gratano, who knew Tremarco from another case of a similar nature, which Tremarco beat, and having recognized Tremarco in the Buick automobile, he trailed them. They were about to do a job, but the detectives, to their everlasting credit, anticipated these defendants before they got that far, and with the use of the police detective department machine crowded these defendants over to the curb and ordered them out, and at or about that time there were sounds of something heavy dropping to the floor of the automobile. There were four revolvers: one magazine gun, two .32's, and one .45 all fully loaded. The .45 gun did not have .45 bullets in it, it had .38's but these defendants knew enough about guns to be able to pack the .38 bullets with

wadding, so as to make them fit into the barrel of the .45 gun. It would not interfere with the shooting to kill. The .32 bullets, Canizio admitted that he sliced the points of the bullets, and in the language of one understanding that knows that that permits the lead to spread out when the bullet is fired and when it reaches the object it hits causing more certainty of death or injury and prevents the bullets in spreading the object that it hits from being identified later on.

Now, Mr. District Attorney, do you consent to take that plea of robbery in the first degree from Canizio, Guariglia, [fol. 18] and Bruno, and to dismiss all other indictments against these three defendants—the plea of robbery in the first degree unarmed?

Mr. Sullivan: As I understand it, the only other indictment is this grand larceny indictment as to Canizio and Guariglia.

The Court: All right, in other words my sentence under the law of robbery in the first degree would be mandatory.

Mr. Sullivan: Yes.

The Court: I would have to give these defendants at least fifteen years up in Sing Sing.

Mr. Sullivan: No objection to the dismissal of the grand larceny indictment.

The Court: All right, you consent to the other plea?

Mr. Sullivan: Yes.

The Court: Take the plea, Mr. Clerk, as against these three defendants.

(Plea taken.)

[fol. 19] I Hereby Certify that the foregoing is a true and accurate transcript of all the proceedings had on June 1, 1931, in the case of The People of the State of New York vs. Frank Canizio, et al.

Ralph E. Roberts, Official Stenographer.

[fol. 20] IN COUNTY COURT OF KINGS COUNTY

[Title omitted]

Brief in Support of Petition to Vacate and Expunge from the Records of the Kings County Court a Void Judgment

JURISDICTION

The facts with regard to jurisdiction are set forth in the foregoing petition and the inherent authority of the Court over its own judgments in Point First in this brief.

STATEMENT OF THE CASE

The basic facts have been set forth in the foregoing verified petition. However, there are other facts and authorities discussed in this brief in connection with the argument to sustain petitioner's cause.

[fol. 21] POINT FIRST

The Power of the County Court of Kings County to Set Aside, Vacate and Expunge From the Record Its Own Judgments, When it Has Been Established in a Proceeding on the Merits That Such Judgments Were Rendered in Violation of Constitutional Rights Is Not Controlled by Statute. This Power Is Based upon the Inherent Right and Duty of the Court to Protect the Citizen in His Constitutional Prerogatives

It has been now well established by the highest court in this State and in the nation, that a Court of competent jurisdiction may, at any time, on a direct application vacate and expunge a void order or a void judgment; in fact, it would logically seem to be the more appropriate procedure, as such a Court has a more immediate access to the records and undoubtedly would be better acquainted in many ways with the facts pleaded. Such a power is not controlled by statute but inheres in the very constitution of the Court itself. It is a function, by its very nature, judicial. Statutes cannot be construed in such a manner to destroy this inherent power or whereby they might be repugnant to the due process clauses of the national and state constitutions, or in such a manner that the constitutions should be a subordinate authority, and although the organic laws contain no descrip-

tion of those processes which it was intended to allow or prohibit, it was not left to legislative authority to enact any processes which might be devised. Den. Ex Dem. Murray v. Hoboken Land etc. 18 How. 272, 15 L. Ed. 372. The power of this Court to set aside, vacate or expunge void judgments, in the furtherance of the ends of justice, is unques-
[fol. 22] tionable. It is a power exercised continually, and grows out of the control it has over its own records and judgments, and when facts exist showing that the ends of justice may require its exercise, the Court should have no hesitation in doing so. This power is continually exercised in civil cases and as was stated by the Court in Lyons v. Goldstein, 290 N. Y. 19, as to the exercise of this power in criminal as well as civil cases that:

> "No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the Courts with reference to them. The power was exercised in criminal cases at common law through the writ of error *coram vobis*. Robinson v. Johnson, 9 Cir., 118 F. (2) 998; United States v. Mayer, 235 U. S. 55."

In the Robinson v. Johnson, 118 F. (2) 998, cited in Lyons v. Goldstein, supra, the Court said:

> "It would seem reasonable that the Court rendering the void judgment could set it aside at any time on direct application for such an order, as well as on a collateral attack by petition for a writ of habeas corpus. Such an application by motion to the trial court is in the nature of an application for a writ of error *coram vobis*. The common law remedy by such writ has been superseded in the federal courts by motion addressed to the Court where judgment is attacked."

For a comprehensive discussion of this procedure by a modern case authority, see Orfield, "The Writ of Error Coram Vobis in Civil Practice (1934) 20 Va. L. Rev. 423; [fol. 23] Abraham L. Freedman in Vol. 3 Temple Law quarterly at pp. 366-371; United States v. Plumer 27 Fed. Cas.

573; Picketts' Heirs v. Legerwood 7 Pet. 144; Moone's Federal Practice, Vol. 3, p. 3257; United States v. Lynch, 132 F. (2) 111.

Compare also Hamilton v. Holcomb, 1 John. Cas. (N. Y.) 29 (1799); Ladd v. Stevenson, 112 N. Y. 325; Vanderbilt v. Schreyer, 81 N. Y. 646; Waley v. Johnson, 316 U. S. 101; Matter of Morhaus, 392 N. Y. 131; U. S. v. Steese, 144 F. (2), decided U. S. C. C. A., 3 Cir. Aug. 25, 1944.

From these existing authorities on the subject, and those which stem from them, it is clear that this Court has abundant authority to hear this case on its merits and grant the relief prayed for.

Point Second

The Right upon Arraignment, and at All Stages of the Proceedings, to the Advise of Counsel Is Jurisdictional, and the Court Had No Authority to Proceed Until It Had Asked the Defendant If He Desired Counsel, and Any Proceedings Thereafter Were Void and in Derogation of the Defendants' Constitutional Rights.

It is well settled, by judicial rulings and legislative mandate, that where an accused appears alone on his arraignment without counsel, he must be asked if he desires counsel. It is not the function of the accused to see that this privilege is accorded him, as it is not presumed he knows he is entitled to benefit of counsel, but the legislature has seen fit to enact an express statute placing such a duty on the judicial officer before whom he is arraigned to so advise him. (Code of Criminal Procedure, Sections 8, 188, 308). This benefit of counsel to one accused of a crime is [fol. 24] a constitutional guarantee, no distinction is made between the arraignment and any other stage of the criminal proceedings. The duty upon a Court of according the accused such right is positive and affirmative and cannot be ignored. To reassure an accused this constitutional prerogative, the New York State Legislature has made positive provisions for its protection by enactment of Section 308 of the Code of Criminal Procedure which reads in part as follows:

> "If the defendant appear for arraignment without counsel, he must be asked if he desires counsel, and if he does the Court must assign counsel."

It should here be noted that the mandatorily word "must" appears not less than twice in this particular part of the statute: "He *must* be asked," and "the Court *must* assign counsel." The intention of the Legislature in the enactment of this statute expressly placing upon the Court this duty is extremely clear. It would be quite a hardship on an ignorant, nineteen-year-old boy, unlearned in the niceties of the law to excuse the failure of advising such an unfortunate young man of his right on the ground that every person is presumed to know the law. It might be presumed he should know right from wrong, generally, but never has any presumption existed that he should know the duties mandatorily placed on a trial judge by the constitution and statutes. Such a presumption is not even attached to a formal indictment—hastily read in part to an accused on his arraignment. These safeguards by constitutional provisions and statutory enactments are not idle [fol. 25] gestures by the people and their representatives, they are placed about a defendant to be accorded him by prosecuting officers and courts, and he cannot be deprived of these rights with impunity. The same principle applies whether the accused be an individual educated in the law (Glasser v. United States, 62 S. Ct. 457) or an ignorant, 19-year-old boy as in the case at bar. The Court cannot demand of the petitioner at that age the degree of perfection which Kipling, in his "If," set forth as some of the necessary attributes of a man, when he said:

"If you can keep your head when all about you
Are losing theirs and blaming it on you;
If you can trust yourself when all men doubt you,
But make allowance for their doubting too;

* * * * * * *

If you can bear to hear the truth you've spoken
Twisted * * * To make a trap for fools

* * * * * * * *

If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you,

* * * * * * * * *

* * * You'll be a man, my son!"

The Courts of this nation have never demanded such a degree of perfection from any human being. Nor can it be likewise demanded of a defendant because he had been previously in a courtroom charged with some offense or [fol. 26] delinquency that it should be presumed he did in fact know of his right to counsel. This is the very presumption that cannot be indulged. People ex rel. Moore v. Hunt, 258 App. Div. 24; People v. McLaughlin, 291 N. Y. 480.

Point Third

The Fact That Petitioner Was Ignorant of His Right to Counsel, Coupled With the Failure of the Court to Inform Him of Such Right, Precludes Any Presumption That Petitioner Waived His Right to Counsel.

It has been well established by the logical and reasonable decisions of the higher courts, that a "waiver" constitutes the relinquishment or the abandonment of a known right or privilege, so it must be conceded that, as at no time was petitioner informed, nor did he know or believe that he was entitled to the assistance of counsel, and at no time did anyone ask him if he desired the assistance of counsel nor did anyone offer to procure such assistance for him; and because he was without money to pay for counsel and believed he could not obtain the assistance of counsel without money to pay a lawyer, that petitioner did not waive his right to counsel. In fact the "Courts indulge every reasonable presumption against waiver" and "do not presume acquiescence in loss of a fundamental right." (Johnson v. Zerbst, 304 U. S. 458). Nor can a presumption be sustained that a defendant knows of his constitutional right to the assistance of counsel, on this problem the court in Evans v. Rives, 126 F. (2) 633, stated:

> [fol. 27] "There is no more basis for such a presumption than for one that a defendant understands the rules governing the sufficiency of indictments, the admissability of evidence, and the burden of proof, or other rules of substantive and adjective law, and the existence of such a presumption is negatived by the statement of the Supreme Court in Johnson v. Zerbst • • • that "The purpose of the constitutional guaranty of right to counsel is to protect an accused from

conviction resulting from his own ignorance of his legal and constitutional rights.' "

When such a constitutional provision is designed solely for the protection of a citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will, by such a waiver the citizen relinquishes or refuses to accept only right belonging to him and him alone, but as such waiver must be defined as the intentional relinquishment of a known right with both knowledge of its existence, and the competent and intelligent intention to relinquish it, in the case of the petitioner who was totally ignorant of its existence he could execute no such waiver. Johnson v. Zerbst, supra; Bennecke v. Conn. Mut. Life Ins. Co. 105 U. S. 355; Cooley's Constitutional Limitations, 219; A plea of guilty constitutes no such waiver. Walker v. Johnson, 312 U. S. 275; People ex rel. Moore v. Hunt, supra.

[fol. 28] POINT FOURTH

Not Only Must This Primary Right Be Protected But There Must Be Made a Record of All Proceedings That Have a Bearing Thereon, So That Intelligent Review May Be Had. People v. McLaughlin, 291 N. Y. 480. Where a Waiver Exists it Is Fitting and Appropriate That it Appear on the Record. Johnson v. Zerbst, 304 U. S. 458

In the case of petitioner there can be little doubt that the records fail to disclose a free and voluntary waiver on his part. The endorsement on the indictments clearly show he appeared personally and it also shows he had no counsel at any time during the proceedings. As this Court has immediate access to the records, it would be of little benefit to enclose such copies as one in possession of petitioner. The endorsement on the indictment show the following:

"All three defendants personally appear and withdrew their pleas of not guilty heretofore entered and plead guilty of the crime of Robbery, first degree, unarmed. June 1, 1931. Nova, J. Mr. Sullivan, A. D. A. All remanded, Part 3."

On the back of the indictment designated for the name of assigned counsel, appears the name of "Frank Canizio,"

the petitioner. It also shows where the petitioner previously was arraigned and pleaded not guilty on May 25, 1931, and also the notation "State Prison at Sing Sing: Minimum fifteen (15) years; maximum thirty (30) years. June 19/31 Nova, J. * * *".

As has been pointed out in the preceding consideration, that while an accused may waive the right to counsel, [fol. 29] whether there is a proper waiver should be determined by the record of the proceedings, it being appropriate that such a waiver would appear on the record as was said by the United States Supreme Court in Johnson v. Zerbst, supra:

> "The constitutional right of an accused to be represented by counsel invokes of itself, the protection of the trial court, in which the accused, whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is a proper waiver by the trial court, and *it would be fitting and appropriate for that determination to appear on the record.* (Italics ours.)

The Court of Appeals of this state in definite and unambiguous language states that such a waiver *must* appear on the record. In People v. McLaughlin, supra, the Court said:

> "not only must this primary right be protected, but *there must be a record of all proceedings that have a bearing thereon,* so that intelligent review may be had. The record before us does not show adequate protection of this defendant's rights, and so his conviction cannot stand. In such a situation, the absence of exceptions is no bar to a reversal. People v. Bradner, 107 N. Y. 1; People v. Miles, 289 N. Y. 360." (Italics ours).

The records in the case of petitioner is void of any such waiver by reason that no such waiver was executed in any manner shape or form. The circumstances of the case, inasmuch as the petitioner was totally ignorant of his right to [fol. 30] counsel and the Court or no one else informed him of such right precludes and makes impossible any waiver.

How could a 19-year-old boy waive a right he did not know even existed?

From all the eminent authorities on the subject it might be concluded that a waiver of this fundamental right must be executed by one in the knowledge of its existence, and made part of any proceedings. Without this prescribed action by a Court, the jurisdiction is lost. The principle which exacts this compliance with constitutional provisions and legislative mandates and prohibitions are illustrated by many cases, both in State and Federal Courts, because criminal prosecutions must be conducted in substance and without essential change as the Federal and State constitutions demand. It is not a mere error at law, it is the denial of a constitutional right. In Glasser v. United States, 62 S. Ct. 457, Justice Murphy in delivering the opinion of the Court, said:

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we must indulge every reasonable presumption against the waiver of fundamental rights."

See also Aetna Insurance Co. v. Kennedy, 301 U. S. 389; Ohio Bell Tel. Co. v. Public Utilities Comm. 301 U. S. 292; New York State Constitutional Convention Report of 1938, Vol. 6, p. 75; United States ex rel. Nortner v. Hiatt, 33 Fed. Supp. 545.

[fol. 31] CONCLUSION

The Judgment of the Kings County Court of June 19, 1931, Sentencing the Petitioner to State Prison for Fifteen to Thirty Years Is Null and Void, and in the Interests of Justice Should Be Vacated and Expunged from the Records

Respectfully submitted, Frank Canizio, Petitioner in Person, 135 State Street, Auburn, N. Y.

Dated at Auburn, N. Y., the 27 day of December, 1944.

[fol. 32] CERTIFICATE OF CLERK

I, Francis J. Sinnott, the clerk of the Kings County Court, state of New York, hereby certify that I have examined this typewritten record of the papers concerning People v.

Canizio, compared them with the original on file in this office, and certify that they are a true copy of said original.

Francis J. Sinnott, Clerk, Kings County Court.

Dated, June 15th, 1945, at Brooklyn, New York.

[fol. 33] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 152

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—October 8, 1945

On Consideration of the motion for leave to proceed *in forma pauperis* herein,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this motion.

[fol. 34] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 152

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the County Court, Kings County, State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

Endorsed on Cover: In forma pauperis. Enter petitioner, pro se. File No. 49,855. New York, County Court, Kings County. Term No. 152. Frank Canizio, Petitioner, vs. The People of the State of New York. Petition for a writ of certiorari and exhibit thereto. Filed June 22, 1945. Term No. 152 O. T. 1945.

[fol. 21] STIPULATION AND ADDITION TO RECORD

SUPREME COURT OF THE UNITED STATES

FRANK CANIZIO, Petitioner,

against

THE STATE OF NEW YORK, Respondent.

It is hereby stipulated by and between the attorney for the Petitioner and the District Attorney of Kings County that certain material consisting of a notice of appearance dated October 17, 1931, signed by John J. Oliva on behalf of the petitioner, in the Kings County Court, an extract from the clerk's minutes, and a stenographic transcript of proceedings on sentence dated October 19, 1931, all duly certified by the County Clerk of Kings County, may be printed as part of the record of the above entitled appeal.

Dated, Brooklyn, N. Y., November 7, 1945.

Maurice Edelbaum, Attorney for Petitioner Canizio.
George J. Beldock, District Attorney of Kings County.

[fol. 22] [Endorsed:] Supreme Court of the United States. Frank Canizio, Petitioner, against The State of New York, Respondent. Stipulation. George J. Beldock, District Attorney, Kings County.

[fol. 23] [Stamp:] Office of the Clerk. Nov. 8, 1945. Supreme Court, U. S.

COUNTY COURT, KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

FRANK CANIZZIO

NOTICE OF APPEARANCE

To the Clerk of the County Court, Kings County:

SIR:

You are hereby notified that the undersigned appear for the defendant(s) in the above entitled action Frank Canizzio, Robbery, 1st degree.

Date June 17, 1931.

John J. Oliva, Attorney for Defendant. Office & P. O. Address 53-63 Park Row, Manhattan, New York City.

STATE OF NEW YORK,
County of Kings, ss:

I, Francis J. Sinnott, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being at Court of Record) Do Hereby Certify that I have compared the annexed with the original Notice of Appearance filed in my office June 17, 1931 and that the same is a true transcript thereof and of the whole of such original.

In Testimony Whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 2nd day of November, 1945. Francis J. Sinnott, Clerk.

[fol. 24] Friday June 19, 1931.

Present: Hon. Algeron I. Nova, County Judge.

Proclamation made and Court opened.

90/130B: Frank Canizio, #3465B, Male, White. Indicted for Robbery, first degree, Grand Larceny, second degree, Assault, second degree, and convicted of the crime

of Robbery, first degree, unarmed, upon his own confession and plea of guilty.

Being personally present and sworn says: My true name is Frank Canizio; I am 19 years of age; I was born in Brooklyn; I reside at 1178 72nd Street; I am a printer; I am not married; I can read and write; I have a Public School education; grade 7B; I am a Catholic, irregular attendant; my parents are dead; I am temperate; I do not use drugs; I have never previously been convicted of a felony.

Being asked and he having nothing to say why the judgment of the law should not be pronounced against him, the Court pronounced judgment as follows:

Whereupon, it is Ordered and Adjudged by the Court that the said Frank Canizio, for the felony aforesaid, whereof he is convicted, be imprisoned in the State Prison at Sing Sing, at hard labor, under an indeterminate sentence, the maximum of such imprisonment to be thirty (30) years and the minimum thereof fifteen (15) years.

It is Ordered by the Court that the Sheriff of the County of Kings forthwith take the above named defendant and safely deliver him to the custody of the Warden of the State Prison at Sing Sing.

STATE OF NEW YORK,
County of Kings, ss:

I, Francis J. Sinnott, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being at Court of Record) Do Hereby Certify that I have compared the annexed with the original Minutes filed in my office June 19, 1931, and that the same is a true transcript thereof and of the whole of such original.

In Testimony Whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 2nd day of November, 1945. Francis J. Sinnott, Clerk.

[fol. 25] COUNTY COURT OF THE COUNTY OF KINGS, PART I

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

FRANK CANIZIO, PATSY GUARIGLIA, TONY BRUNO, Defendants.

Before Hon. Algeron I. Nova, County Judge.

Brooklyn, June 19, 1931.

APPEARANCES:

Counsel for all defendants.

The Court (as the lawyer attempted to speak): We have discussed this case, haven't we? There isn't anything in the world that you can say to me that is going to change my mind on these sentences. I have lived with this case.

Counsel for Canizio: I have the sister of the defendant here. I would like to have your Honor hear her just a moment. I think it is very important that you should hear the sister of Frank Canizio.

Counsel for Bruno: In the Bruno case, the counsel for the defendant Bruno is not here. He is in Queens.

The Court: I know all about that boy. You don't need him here because I have got my mind made up what to do [fol. 26] with him. If he were here it would not make any difference.

Counsel for Bruno: He asked me to request your Honor to hold this matter over until Monday.

The Court: No; I am going to sentence this morning. (To the sister of Canizio) What do you want to tell me about your brother? I don't want to hear your feelings. I know his whole history.

Counsel for Canizio: Tell the Judge how long he has been living with you, how long your mother is dead, how long your father is away in California.

The Court: I don't need to have them tell it. I have the complete social history from our investigation. I have got it all.

Counsel for Canizio: I wanted her to tell your Honor something about her brother. Tell the Judge how he has been living.

The Sister: He is always living with me. My father deserted us two years ago.

The Court: After all, Counsellor, help me a moment. I am just as humane and human as anybody else, and if it is going to serve your purpose to have her brought here that is all right, but that does mean a thing to me. She wants me to be sympathetic with her brother.

The Sister: Please——

The Court: You listen to what I have got to say. I [fol. 27] cannot be sympathetic with him, because I have a duty to do. I advise you to leave the court-room now because what I am going to do is not going to be pleasant for your sense of hearing. If you want to stay in the court-room you can stay, but it is not going to be pleasant.

Counsel for Canizio: If your Honor please——

The Court: Now listen Counsellor, don't give me that kind of stuff at all. Don't bring these clients up to me because you think it is going to help you earn your fee in any way. You don't have to do that with me. That is all. My job is here and it is hard enough as it is without you lawyers making it harder for me.

Counsel for Guariglia: In the Patsy Guariglia case your Honor knows the facts and I leave it in your hands.

The Court: You lawyers know what I am talking about. I permitted you to sit in my chambers, and that is an unusual thing. Seldom do I permit lawyers to do it. We have analyzed the facts of the case and how we made up the sentences. Why stand here with your clients and try and upset it when there is no good purpose?

This is Indictment No. 2465 against Frank Canizio, Patsy Guariglia and Tony Bruno. Patsy Guariglia is 16 years of age, living with his sister and has never been in any trouble before. He had a truancy charge against him, and it was out of the Parental School, but in my mind that does not mean a thing. It does not establish any criminal tendency. Bruno [fol. 28] is 17 years of age and lives with his mother, and he is out on probation under a suspended sentence out of this court at 17 years of age. Let the record recite that he needs a tremendous amount of medical attention because if my report is correct he is terribly diseased. Canizio is 19 years of age and has had his experience of being in the House of Refuge where he was sent because of his violation of his previous admission into the Catholic Protectory.

What are the facts in this case? These three defendants under the guidance of Canizio—and the facts in the case

will show that I am right, and even at the expense of repetition I would say this is not pleasant for me to do and I don't like to do it, but the law compels me to do it and I have got to live up to my oath. I don't tell these people who come before me that they should go out and commit these terrible things. These three boys and others held up a taxicab man. They took a ride with him and then after they took his car they used it to hold up with guns and out of two or three hold-ups all they got was fifty cents. Then the next day they had a stolen Buick car. One of these three defendants, I don't remember who it was (or one of the other two that have not yet been tried) was in another robbery case. I don't know how many robberies these fellows committed, but the record shows that Canizio was [fol. 29] the leader. At any rate they stole a Buick car and a fine detective in this case, a splendid gentleman, likewise of Italian extraction, such as these young men, became apprehensive when he saw them in the Buick car that they were about to go out on another job and he determined not to permit them to carry out or to complete the crime that they were about to commit, and ran their car over to the curb, and when he did that the guns fell to the bottom of the floor of the Buick car that they had and were using, and which was stolen. What are the guns? There were two 32's, I think it was, loaded and well-oiled, so that there would not be any trusting to luck that they would not operate, because I examined the guns and the oil was oozing out around the barrel and around the trigger. Then there was another .45 gun, and they did not have the bullets for the .45 but they were so smart that though they did not have .45 bullets, they took .38 bullets and they packed the .38 bullets on the outside with wadding to make them fit within the .45 gun. The bullet would not travel the distance that a .45 would have travelled, but it would go at least 100 yards, which would accomplish their purpose. In the .32 guns admitted by Canizio, and he also admitted in open court that the other .45 was his gun and that he supplied the guns—in the .32 guns they had the tips of the bullets split so that when one would enter a body it would [fol. 30] spread and make certain of injury. A lucky thing that the policeman in this case, who should be publicly complimented—did not permit those boys to go on this nefarious undertaking, which undoubtedly would have resulted in a felony murder, if they did not receive themselves

for it, the bullet from the policeman's gun. But the policeman stopped them. We figured around here for hours about the question of a plea to the indictment as charged unarmed and for the disposition of other charges against them. Canizio said, "Why don't you give us a break?" I said, "What kind of a break would you give the cops in this case when you had the lay on them and they did not stop it?" And his brazen answer, "I did have the lay on them and could have given him the works; but I did not do it." What a high-handed piece of effrontery that was coming from the mouth of a 19-year old defendant who served a term in the House of Refuge and had his opportunity along the lines of reformation and did not accept it! He accepted the responsibility of the guns in the case; but there is another gun, a magazine .38 which the driver of the car had in his home and admitted to the policeman that that was in the car. These young men, 16, 17 and 18 years of age, with an arsenal upon them, going out on absolute warfare! But I could go on talking about this case for hours, about these miserable and despicable things.

[fol. 31] (One of the defendants made some answer which the stenographer did not catch.)

The Court: You should deny that. You are Tony Bruno. I remember you. What a pity it all is! You were the one that had the magazine gun in your house, weren't you?

Bruno: Yes.

The Court: You were the one that drove the car.

Bruno: No; sir, I was not.

The Court: You were in the car that night?

Bruno: No; they picked me up home.

The Court: Where did you get the magazine gun you had?

Bruno: I found that gun.

The Court: Where did you find it?

Bruno: Sixty-ninth Street.

The Court: Yes, you did! You lie! That gun was traced to Elmira. That is where that gun was traced to, and one of the co-defendants is out on probation out of Elmira. You haven't got us fellows around this court bluffed, take my word for it, because when I go into an investigation I get every bit and I remember every fact. The difficulty that comes here is that people are not going to understand the difference in the sentences in this case. Here is a fellow 16 years of age, without a record, and here is another

fellow out on probation from this court at 17 years of age. The home life in both instances is miserable. The home life in Bruno's case is most unfortunate. I cannot send [fol. 32] them to Sing Sing. They are not old enough to *do* there. It would serve no good purpose if I sent them there even with all the terrible things that they did, in my judgment. That may be wrong. I say that they are not the age to go there, these two boys—the other fellow, yes. These two boys go to Elmira Reformatory and that is the sentence; that is Bruno and that is Guariglia; and let me tell you something about the new law up there. If you don't behave yourself and you don't obey the rules and if the officials at Elmira, insofar as you two fellows are concerned, are not satisfied that you are proper subjects for Elmira, they can send you away to any other state prison for the same term as I could, for the limit thereof. That means this, that any time while you are in Elmira, and in their judgment and opinion you are not fit subjects for that institution or you are incorrigible or you don't obey the rules or you don't do the right thing, all they have got to do up there is to send you over to Sing Sing for 15 years and they can do it.

Insofar as Canizio is concerned, I am going to send him to Sing Sing for a minimum of 15 years to a maximum of 30, and the reason I do it is this, that every fact and circumstance in this case show you to be the ring-leader of the mob. You, yourself admitted you supplied the guns, you admitted the ownership of the guns. When I took a plea of [fol. 33] you to this one indictment unarmed—and that was the only thing the District Attorney would consent to—in my judgment you got all the clemency that you deserved. You have been in the House of Refuge, you have had your experience. You are 19 years of age, you were old enough to acquire experience and to understand what you were doing. Having admitted that you were the one that negotiated this entire situation, and with your age and your experience, I am not permitted to send you to Elmira. I don't fix the sentence. The law fixed it. It may be that the sentence is severe even for your age, but you have this to find out, that the law of the State of New York and not the judge, fixes the sentence and you have got to find fault with the law and not with the judge that imposes the sentence. And what is more you haven't any right to find any fault with anybody, because you have been a persistent violator of

the law. You knew what you were going to do. You have got plenty of "guts", because you had the temerity to stand up before me and ask for the break, and you did not need a lawyer to make representation for you. In your case, Canizio, the sentence of the court is as pronounced, a minimum of 15 years to a maximum of 30, and your two co-defendants, Elmira Reformatory.

. . . . . .

STATE OF NEW YORK,
County of Kings, ss:

I, Francis J. Sinnott, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being at Court of Record) Do Hereby Certify that I have compared the annexed with the original remarks filed in my office June 19, 1941, and that the same is a true transcript thereof and of the whole of such original.

In testimony whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 2nd day of November, 1945. Francis J. Sinnott, Clerk.